No. _____

In The
Supreme Court of the United States
October Term, 1993

WALTER E. PILDITCH,

Petitioner,

v.

MARTY GOOL, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, according to the standard of evidentiary review established by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the court of appeals failed to follow that standard in reversing the trial court's findings and the jury's verdict determining that petitioner had been the victim of employment race discrimination.

2. Whether a plaintiff is required to present "hard evidence" beyond and separate from that circumstantial evidence presented in support of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden shifting framework, to carry his ultimate burden of proving intentional discrimination in a Title VII cause of action.

LIST OF PARTIES

WALTER E. PILDITCH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, A BODY CORPORATE AND POLITIC: FITZ BARCLAY, JR., MARTY GOOL, ESTHER MORGAN-WATTS, CALVIN L. PEARCE, AND WILLIA ROBINSON, AS MEMBERS OF THE MORGAN PARK HIGH SCHOOL LOCAL SCHOOL COUNSEL; GRADY C. JORDAN, AS DISTRICT SUPERINTENDENT, HIGH SCHOOL DISTRICT 11, CHICAGO BOARD OF EDUCATION,

Respondents.

The parties as listed above appear as in the caption used by the court of appeals in its opinion and include all of the original parties in the court of first instance. The actual parties in interest in this petition for a writ of certiorari are those against whom judgments in the trial court were entered and then reversed by the court of appeals, namely, MARTY GOOL, CALVIN L. PEARCE, AND WILLIA ROBINSON.

RULE 29.1 STATEMENT

Petitioner is an individual and not a corporation and thus has no parent or subsidiary companies.

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C. ignored other substantial evidence in the record. 7

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter E. Pilditch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 3 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1993. A petition for a rehearing thereof was timely filed on September 10, 1993. The petition for rehearing was denied by the court of appeals on September 21, 1993, and this petition is being filed within 90 days of that latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case is one of first impression under a statute designed to improve the face of Chicago's sagging public school system. The law (The Chicago School Reform Act, 105 ILCS 5/34, effective May 1, 1989) transferred a modicum of authority from the Chicago Board of Education to local school councils at each elementary and high school in the form of the right to choose principals for their schools. Each council was to consist of ten members, two community representatives (from the community compromising the school's attendance area), six parent members (each with a child at the school), and two teacher members (teachers at the school). Teacher members were to be elected by their peers. Parent and community representatives were elected (first election October, 1989) by parents voting only for six parent representatives and community residents without children at the school voting for only the two community resident positions. Terms were for two years. This portion of the law, as it related to the election of community and parent representatives, was held unconstitutional by the Illinois Supreme Court (*Fumarolo v. Chicago Board of Education*, 142 IL 2d 1283 (1990)) and The Reform Act ultimately revised to permit all parents and community residents to cast a maximum of five votes for the eight council positions (105 ILCS 5/34-2.1 (d)).

The Mayor of Chicago reappointed all unconstitutionally elected council members to complete the balance of their terms (to October 1991). The second election under The Reform Act (October, 1991) was held under the constitutionally corrected voting provisions.

Petitioner, Walter E. Pilditch, a Chicago public high school principal, was one of the first casualties of the new law. The Chicago School Reform Act abolished principal's tenure, constructively imposed four-year performance contracts upon principals (expiring either June 30, 1990, or June 30, 1991; by lot Pilditch's expired June 30, 1990), created mini school boards at each school (local school councils) and empowered them to select

principals. The first councils were elected citywide in October, 1989. On February 21, 1990, the council at Morgan Park High School, where petitioner had been principal since 1984, voted not to retain him as principal. To be retained for a four year term required the affirmative votes of six (of ten) council members. Pilditch received five affirmative votes for retention. Four voted not to retain him and one member abstained. These five members (four and one) are black, or in one instance black-hispanic; Pilditch is white.

Pilditch, believing he had been the victim of employment race discrimination, filed his complaint with the EEOC naming the Chicago Board of Education and the five council members who voted against him as respondents. A right to sue letter issued and Pilditch sued in Federal District Court (September, 1990), the Chicago Board of Education (his employer), a black district superintendent who did not select him from the list of three candidates (two black) presented to him by the council for selection of a principal when the council was unable to agree on a single candidate, and the five council members who had not voted to retain him as principal because of his race in violation of his rights under Title VII of the Civil Rights Act of 1964, (42 U.S.C. § 2000e-2(a)(1)) and 42 U.S.C. 1981 and 1983.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331 and 1343.

The case was tried over a three week period in April and May of 1992 before a racially mixed jury of ten men and women. Properly instructed, they returned verdicts on May 4, 1992, in favor of Pilditch and against three of the council members, Gool, Pearce and Robinson. Though the Civil Rights Act of 1991 had amended Title VII to provide for jury trials as a matter of right, when this case was tried, it was not clear whether or not the amendment would apply retroactively and thus with respect to the Title VII count, the jury's verdict was taken as advisory by the trial judge who entered his own findings of fact in general support of the jury's

conclusions. (App. 13 a) The case was properly tried to a jury on the 1981 and 1983 counts.

Both jury and trial judge found that Pilditch had established by a preponderance of the evidence that three of the defendants, Gool, Pearce and Robinson had not retained Pilditch as principal because of his race.

That finding has been reversed by the appeals court after a *de novo* review of the record.

REASONS FOR GRANTING THE PETITION

I.A.

The appeals court has not followed the "clearly erroneous" standard of review of *Anderson v. Bessemer City*, 470 U.S. 564 (1985) in that it has: substituted its judgment on the facts for that of the joint triers of fact below.

Anderson v. Bessemer City discourages the *de novo* review of factual issues that involve the weighing of evidence and the evaluation of the credibility of witnesses. Especially in cases of discrimination are those issues best left to the triers of fact, those who have looked witnesses squarely in the face and have heard testimony first hand.

Only in cases of the clearest error is the judgment of the trier of fact to be reversed.

As stated by Justice White in *Anderson v. Bessemer City,* at pg. 575, ". . . requiring (plaintiff) to persuade three more judges at the appellate level is requiring too much". It was just such persuasion that the court of appeals sought here during oral argument (opinion, App. 11a).

I.B.

The appeals court has not followed the "clearly erroneous" standard of review of *Anderson v. Bessemer City*, 470 U.S. 564 (1985) in that i has: drawn inferences from the evidence to support its own opinion rather than equally plausible inferences that would support the judgment of the initial triers of fact.

Where more than one inference may be drawn from evidence or testimony and the trier of fact draws a plausible inference therefrom, that inference or finding cannot be clearly erroneous simply because a court of appeals draws another inference therefrom. *Anderson v. Bessemer City*, 470 U.S. 574.

The court's opinion provides three examples of this contradictory inference drawing:

One is the reference to the broad smile of defendant Pearce at the time of his abstention in the February 21, 1990, vote on whether or not to retain Pilditch. The court of appeals saw it as a visible expression of a random thought unrelated to the voting process (" . . . Pearce might have been smiling because he just made plans for dinner at a fine restaurant", opinion, App, 9a). The jury and trial court might well have seen it as an expression of gratification at having participated in the firing of a white principal, as a tangible expression of reverse discrimination successfully executed.

A second piece of the evidence was defendant Pearce's "black male presence" conversation with another council member in the school's library. In that conversation (prior to the February 21, 1990 vote) Pearce referred to the need for a strong black male presence at the school. The court of appeals construed it as an isolated statement relating to teachers and not principals (neither were mentioned), not related to any specific action or decision by Pearce and one that expressed "a widely held view" (opinion, App. 10a). An equally

plausible interpretation of that conversation was that Pearce wanted a black principal for the school (at Pilditch's expense), that it was Pearce's view that the school's predominant black population (60%) entitled it to such, and in voting not to retain Pilditch (not voting affirmatively to do so), he fulfilled that expressed desire.

The third and only other piece of evidence from which the court draws its own contrary inference, is that of the victory yell or outburst of defendant Robinson as she entered the women's washroom following the February 21, 1990, vote. Her words were: "We did it girl!" The court of appeals infers (opinion, App. 10a) that such an outburst "suggests dislike of the principal (Pilditch) . . . but all dislike is not based on race." An equally plausible inference, as the trial court and jury were free to draw, is that Robinson's "whoop" was evidence of racial animus, particularly in view of other circumstantial evidence which the court of appeals failed to consider. Personal animosity may be racially motivated.

Based on these three pieces of evidence, from which the court draws its own inferences, those most favorable to defendants, the court of appeals concludes that based on the "paltry record" (opinion, App. 11a) the only way to conclude that Pilditch was discriminated against is to make the insupportable assumption that every time a black council member votes against a white principal the decision is motivated by race, and , that "hard evidence" (opinion, App. 11a) is required to prove that their action was inspired by improper motivations.

"Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous" *Anderson v. Bessemer City,* 470 U.S. at pg. 574.

I.C.

The appeals court has not followed the "clearly erroneous" standard of review of *Anderson v. Bessemer City*, 470 U.S. 564 (1985) in that it has: ignored other substantial evidence in the record.

The "paltry" record includes other evidence which, when considered together, produces a mosaic that in turn forms a reasonably clear picture from which the triers of fact could have reasonably concluded that defendants' votes were motivated by race.

This evidence includes:

1. Defendants' refusal to give any reason for their vote not to retain Pilditch. The Chicago School Reform Act was amended after this verdict to require councils to give reasons for their decision (105 ILCS 5/34-2.3-1)

2. The high school's performance record during Pilditch's six (6) year tenure. Test scores and attendance consistently improved.

3. The almost unanimous support for Pilditch's retention by faculty and staff.

4. Racial polarization of the Council. The vote to retain Pilditch was along racial lines: five council members voted to retain (four white, one teacher, Helen Thomas, black); four voting not to retain (3 black, 1 black-Hispanic); one abstention, black.

5. After voting not to retain Pilditch, in the subsequent extended selection process, none of the three culpable defendants, Pearce, Gool or Robinson, ever voted for a white candidate.

6. Robinson and Pearce had never had a child at Morgan Park High School before transferring their children from parochial schools in September 1989 in order to be able to run for and serve on the local school council at Morgan Park.

7. Racial consciousness of Pearce, Robinson and Gool as expressed in conversations with other council members regarding display of African-American history materials in library, why percentage of black students hadn't increased during Pilditch's tenure, etc.

8. Pearce's smiling abstention as a transparent attempt to appear objective.

9. Pearce's (chairman) disdain for public participation or opposition and his stranglehold on the post Pilditch rejection selection process.

10. The brevity and perfunctory nature of the evaluation (of Pilditch) process as determined and conducted by the defendant council majority. Formal evaluation took place in a 45 minute executive session immediately preceding the vote of February 21, 1990 during which defendant council members voiced concern over a failure by Pilditch to significantly increase the black student population at the school. There was not even a pretence of objective evaluation. Black defendant council members expressed outrage at the request for a more extended evaluation process.

11. The patently transparent "at this time" argument advanced by defendants at trial, i.e. that they voted not to renew Pilditch's contract only to give themselves the opportunity to review other candidates and that their negative votes were not a rejection of Pilditch, and that they still considered him as a viable candidate. This was belied by the subsequent voting record of Gool, Pearce, and Robinson. They never cast any votes for Pilditch or for any white candidates.

12. The pretextual reasons offered by some defendants at trial to discredit Pilditch's performance: (a) supposedly hazardous conditions in science labs and (b) racial slur made by a white teacher. On both counts Pilditch introduced substantial evidence from which the trial court and jury might reasonably have concluded that the reasons were pretextual and a mere screen for racial discrimination.

An indication of the impact of the evidence presented by plaintiff and the credibility thereof could be seen in the jury's assessment of punitive damages against the liable defendants when they returned their verdict finding that defendants had intentionally discriminated against plaintiff because of his race.

What the court of appeals has done is to pick from the dry bones of the paper record, without an opportunity to judge the credibility of testimony, three pieces of circumstantial evidence capable of many interpretations and construe them in defendants' favor, ignore other pieces of plaintiff's evidentiary tapestry, and conclude, contrary to *Anderson v. Bessemer City,* that those three pieces of evidence, so construed, are insufficient to support both jury's verdict and court's finding in the absence of any additional "hard" evidence.

No one was in a better position to observe and sift the evidence than the jury and judge. They were in the best position to determine the sincerity and credibility of witnesses. It was for them to determine the meaning of Robinson's "war whoop" and absolute refusal to explain her vote. It was for them to see her evasive responses to direct questions.

> "Among the most difficult question faced by District Judges is the determination of 'discrimination'. It is a concept that while easy to define, may be exceptionally difficult to ascertain in a specific situation. It requires an examination into the mental processes of those who are deemed to have discriminated" *Gutzwiller v. Fenik*, 645 F.Supp. 363 (S.D.Ohio, 1986) at page 365.

Those who commit discrimination know it is wrong and do all they can to conceal it. The court of appeals, in its opinion, has unrealistically purified the defendants' mental processes. The jury and trial judge knew better.

The court of appeals calls for "hard" (opinion, App. 11a) evidence of discrimination in these cases and, then, as an example, (opinion, App. 10a), cites what defendant

chairman Pearce might have said to show evidence of a discriminatory intent. "If, for example, Pearce had made statements to the effect that he disliked or distrusted whites in general or could not judge them fairly" In other words, if Pearce had admitted a discriminatory intent then Pilditch might have proven his case. Such a position precludes a plaintiff from ever establishing a case of discrimination from circumstantial evidence and gives Local School Councils, under the guise of "school reform" the power to hire and fire principals without regard to the salutary provisions and protection of Title VII, § 1981 and 1983.

II.

The court of appeals has emasculated *McDonnell Douglas* and misinterpreted *Hicks* by holding that plaintiff must prove employment race discrimination by "hard" evidence rather than by a preponderance of circumstantial evidence.

This Court in its opinion in *St. Mary's Honor Center, et al. v. Hicks*, 113 S.Ct. 2742, dealt with the question of where the ultimate burden of proof lies in a cause of employment discrimination in relation to the burden shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, for proving discrimination by indirect evidence. In addition to discussing with whom the ultimate burden of proof lies, they also gave an indication of what type of evidence may be sufficient to carry that burden. We do not dispute the court of appeals' holding that the ultimate burden of proof lies with the plaintiff, but we do believe that they are in error in their extension of the *Hicks* opinion to require "hard evidence" to prove discrimination under Title VII. It is just such an extension that the dissent feared would be made, but was assured by the majority that it would not. See *Hicks* at 2761. This matter needs to be clarified by this Court as we believe the court of appeals to have made an unfortunate decision that contravenes the logic of this court in the *Hicks* and

McDonnell Douglas cases, as their holding essentially obviates the purpose of the *McDonnell Douglas* framework, which was certainly not the intention of this Court in *Hicks*, by redefining the type of proof sufficient to support plaintiff's ultimate burden.

The trial of the underlying cause of action in the district court properly utilized the *McDonnell Douglas* framework in the presentation of evidence. Plaintiff demonstrated his *prima facie* case, defendants offered legitimate nondiscriminatory reasons for his non-retention, and plaintiff offered voluminous evidence to demonstrate those reasons to be pretextual. It is at this point that the court of appeals' opinion conflicts with and/or misinterprets *Hicks* on two basic grounds.

The first point of conflict is in the court of appeals' requirement of "hard evidence" of discrimination, offering the following statement as the lone example of such evidence: "If, for example, Pearce had made statements to the effect that he disliked or distrusted whites in general and could not judge them fairly" (opinion, Appendix, pg. 10a). Such a statement, if made, would have obviated the need to make use of the *McDonnell Douglas* framework in this or any other case of employment discrimination. It would have been essentially direct evidence of discriminatory intent. It was clearly not the intention of this Court in *Hicks* to divest plaintiffs of the means of proving intentional discrimination through circumstantial evidence. As this Court stated, "the fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination" *Hicks* at pg. 2749. However, the court of appeals takes this case from the original fact finders and imposes the additional requirement of "hard evidence". It is precisely the lack of such evidence which led to the development of the *McDonnell Douglas* framework, which allows an individual such as petitioner herein to present his cause to judge or jury based upon circumstantial evidence only, see *United States Postal*

Service Board of Governors v. Aikens, 460 U.S. 711, 716, which is predominately the only evidence available in employment discrimination actions. The court of appeals' search for "hard evidence" such as it has described would have a chilling effect on the decision of many similarly situated employees to pursue their cause of action under Title VII, and would certainly curtail the availability of Title VII protection to those who are discriminated against by those employers who in this age of awareness accomplish their task of invidious discrimination covertly.

The second and related misinterpretation is found in the court of appeals' failure to consider any of the evidence presented by plaintiff in support of the *McDonnell Douglas* framework in deciding whether plaintiff met his ultimate burden. It seems that the court of appeals, in its holding, based on *Hicks*, that the *McDonnell Douglas* framework drops out of the case following the plaintiff's presentation of evidence that the proffered reasons of defendants are actually a pretext for discrimination, not only dropped the framework but the evidence presented in support of that framework. That was certainly not this Court's intention in *Hicks*. The ultimate burden remains upon the plaintiff to prove intentional discrimination, yet the elements supporting the prima facie case, reasons offered by defendant in rebuttal, and most importantly evidence demonstrating that said reasons are pretextual, are all vital pieces of circumstantial evidence in support of the plaintiff's ultimate burden. As this Court stated in *Hicks*, "surely a more reasonable reading is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination" *Hicks*, at 2752. The court of appeals has seemingly abandoned not only the framework of *McDonnell Douglas* but all of the evidence supporting it, requiring plaintiff to present his case from that point forward, stating "having offered these apparently legitimate reasons, the *McDonnell Douglas* formula disappears and the plaintiff is left to unmask, if he can, the reasons proffered by the employer

as false. Beyond this, he must also prove that the true reason for his firing was discriminatory." Opinion, Appendix, pg. 8a, citing *Hicks* at 2749. This is an inaccurate statement of this Court's position, as the trier of fact, at the point the framework drops out, is to proceed to determine the ultimate question, not seek additional proofs therefor. *Hicks* at 2749.

That the above errant reasoning must have been applied by the court of appeals is evidenced in their opinion, as they cite only three pieces of evidence, as the sum of plaintiff's case, which they believe in any way support plaintiff's ultimate burden. Opinion, Appendix, pgs. 8a-10a. This is so despite the fact that both a *prima facie* case had been demonstrated *and* plaintiff had presented ample evidence to demonstrate the falsity of the reasons presented by defendants in addition to the evidence mentioned by the court of appeals. The utter failure to address or consider this circumstantial evidence as part of their review demonstrates their misapplication of the basic holding in *Hicks* and *McDonnell Douglas* which is simply put, that the ultimate burden always rests with the plaintiff and that demonstration of defendant's reasons to be pretextual does not *compel* judgment for plaintiff. Somehow the court of appeals has taken this one step further, to mean that beyond the *McDonnell Douglas* framework plaintiff *must* present "hard evidence" of defendants' intent to discriminate in order to carry his burden, which holding would essentially bar all Title VII plaintiffs from success at trial, as such evidence simply seldom exists. This Court has established a framework which the court of appeals has significantly eroded with its opinion herein.

This case bears similarity to *Hicks* in that the court of appeals in both instances reversed the decision of the fact finder at the district court level. In *Hicks* the court of appeals reversed a judgment entered in the district court finding plaintiff not to have met his ultimate burden of proof, which reversal was based on a reading of *McDonnell Douglas* that judgment was compelled for plaintiff where the reasons of defendants

were demonstrated to be pretextual. Here the court of appeals has reversed the judgment of the fact finders that plaintiff had carried his ultimate burden of proof, which reversal is based upon the alteration of that burden to require what is essentially direct evidence. However, the level of plaintiff's ultimate burden lies somewhere in between, precisely where petitioner directed the court of appeals to look, " at the totality of the circumstances." (opinion, App., pg 11a) Judgment is neither compelled for plaintiff upon demonstration of pretext (*Hicks*) nor should it be compelled for defendants in the absence of direct evidence. Judgment must be based upon all of the evidence in the case including that which the court of appeals has brushed aside in its search for hard evidence or the proverbial smoking gun.

III.

This combined effect of the decision of the court of appeals will have a chilling effect on those suing under Title VII, 1981, or 1983, and is contrary to the congressional intent of those laws and to the decisions of this Court.

This Court in *Hicks* never went so far as to hold that direct evidence of discriminatory intent was required for the plaintiff to meet his ultimate burden. The court of appeals, however, has done so in this case. The criticism of the dissent in *Hicks* clearly applies to the opinion rendered in this case when it states: "The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent." *Hicks* at 2761. The lack of direct evidence is what led to the development of the *McDonnell Douglas* framework to allow plaintiffs the opportunity to expose well crafted and disguised intentional discrimination.

The decision of the court of appeals will significantly narrow the road that leads to a successfully prosecuted case of employment discrimination and will do so at the expense of the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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